No. 43108-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Bryan Hart,

Appellant.

Grays Harbor County Superior Court Cause No. 11-1-00422-1

The Honorable Judge Gordon Godfrey

Appellant's Opening Brief

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge answered a jury question behind closed doors. Did the trial judge violate the constitutional requirement that criminal trials be open and public by answering the jury question in chambers without first conducting any portion of a Bone-Club analysis?

2. To obtain a conviction for second-degree assault, the prosecution was required to prove that Mr. Hart assaulted another with a deadly weapon. Here, the state failed to prove that Mr. Hart's firearm was operable. Did the assault conviction violate Mr. Hart's Fourteenth Amendment right to due process because the evidence was insufficient?

3. A firearm enhancement may not be imposed unless the state presents sufficient evidence that the offender was armed with

an operable firearm. In this case, the evidence was insufficient to prove Mr. Hart was armed with an operable firearm. Did the imposition of a firearm enhancement violate Mr. Hart's Fourteenth Amendment right to due process?

4. A firearm enhancement may not be imposed absent a jury finding that the accused person was armed with an operable firearm. Here, the words "armed" and "firearm" were not defined for the jury; thus the jury's verdict does not reflect the required finding. Did the imposition of a firearm violate Mr. Hart's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22?

5. The First Amendment requires the trial court to instruct a jury considering a charge of harassment on the requirement that the state prove a "true threat." In this case, the trial judge did not instruct the jury on the "true threat" requirement. Did Mr. Hart's conviction for harassment violate his First and Fourteenth Amendment rights?

6. A criminal Information must set forth all essential elements of an offense. The Information charged Mr. Hart with harassment, but failed to allege that he made a "true threat." Did the Information omit an essential element of the offense in violation of Mr. Hart's right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?

7. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, Mr. Hart's defense attorney failed to conduct an adequate investigation. Was Mr. Hart denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

8. The guarantee of effective assistance requires defense counsel to be familiar with the law, to make appropriate objections, and to request appropriate instructions. Here, counsel failed to object to inadmissible hearsay and failed to seek an instruction

limiting the jury's consideration of a prior inconsistent statement. Was Mr. Hart denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Bryan Hart and Jennifer Hargrove had a positive relationship for about 18 months, when he began to behave in ways that concerned her. RP (1/11/12 a.m.) 34-35. According to Ms. Hargrove, Mr. Hart

> Just kind of cut himself off from everybody and started staying home and just really wasn't feeling himself. And he start [sic] getting a little depressed and decided to go see the doctor. RP (1/11/12 a.m.) 35-36.

After visiting the doctor, he continued shutting himself off, stopped doing things that he'd previously enjoyed, and stopped seeing his friends. RP (1/11/12 a.m.) 36. He also became paranoid, and accused Ms. Hargrove of cheating on him. RP (1/11/12 a.m.) 36.

Several months after the beginning of his decline, Mr. Hart sent Ms. Hargrove a series of angry texts, accusing her of cheating on him, calling her names, and making vague (and sometimes nonsensical) statements that implied menace.[1] RP (1/11/12 a.m.) 37-46. These messages showed Ms. Hargrove that Mr. Hart was not himself. RP (1/11/12 a.m.) 42. She did not feel threatened, but was very concerned for him, and so she contacted the police and showed them the messages. RP

[1] For example, one text read "If my d*ck is f*cked up y0ur [sic] next stripper wh0re [sic]." Exhibit 24, Supp. CP; RP (1/11/12 a.m.) 41-42.

(1/11/12 a.m.) 43. Mr. Hart had not done anything to cause her to think he might harm her (or anyone else). RP (1/11/12 a.m.) 44.

Five officers went to Mr. Hart's house at 3:00 a.m. RP (1/11/12 a.m.) 49-50, 52. When Mr. Hart came to the door, he seemed like he had just awakened. RP (1/11/12 a.m.) 53. What happened next is in dispute. According to several police officers, Mr. Hart refused to talk, went back inside and closed the door. He emerged again after five minutes with a handgun, stood on the porch, and (at one point) aimed at one of the officers. RP (1/11/12 a.m.) 53-54, 56-58; RP (1/11/12 p.m.) 19-23, 27-29. He then retreated back into the house and slammed the door. RP (1/11/12 a.m.) 58.

Under Mr. Hart's version of events, he was awakened by a loud knock, and he came to the door with his gun. After opening the door and realizing that the people outside were police officers, he went back inside, frightened and confused, and texted his mother. RP (1/11/12 p.m.) 62-64, 69. He denied going out a second time to aim the gun at anyone. RP (1/11/12 p.m.) 63, 69.

Mr. Hart was arrested and charged with second-degree assault (with a firearm enhancement) and misdemeanor harassment. CP 1. The language charging harassment did not allege that Mr. Hart made a "true threat." CP 1-2.

Almost a month prior to trial, Mr. Hart expressed dissatisfaction with his court-appointed attorney. RP (12/19/11) 5-6. The court addressed his concern and no action was taken. RP (12/19/11) 5-6.

At trial, defense counsel did not object when the prosecutor introduced testimony about Ms. Hargrove's out-of-court statement to police. In the statement, Ms. Hargrove had allegedly expressed concern for her own safety, and not just for Mr. Hart's well-being.[2] RP (1/11/12 a.m.) 49. When the state rested, defense counsel forgot to make a motion to dismiss, and forgot to deliver his opening statement. RP (1/11/12 p.m.) 50-55. Instead, he made the motion to dismiss and gave his opening only after calling Ms. Hargrove back to the stand to reaffirm that she'd been worried about Mr. Hart, and not about herself. RP (1/11/12 p.m.) 50-61.

When he made the motion to dismiss, counsel did not seem to realize that his failure to object earlier meant that Ms. Hagrove's out-of-court statement had been admitted as substantive evidence, instead of for the limited purpose of impeachment. RP (1/11/12 p.m.) 55-57. The motion was denied. RP (1/11/12 p.m.) 57.

[2] The testimony was evidently offered to impeach Ms. Hargrove's testimony. However, in the absence of an objection or a request for a limiting instruction, the evidence was admitted without limitation.

Among the police witnesses at trial was Detective Sergeant Shane Krohn. Krohn testified that police had seized Mr. Hart's handgun but had never test-fired the weapon. RP (1/11/12 p.m.) 43. When asked if the gun was in working order, Krohn testified that it "looks to be in very working order [sic]," and that it did not "look to be damaged or anything." RP (1/11/12 p.m.) 43.

Mr. Hart was the last witness to testify. On direct examination, he testified only about the assault charge; he did not refer to his relationship with Ms. Hargrove or discuss the texts. RP (1/11/12 p.m.) 62-64. On cross, the prosecutor sought to examine Mr. Hart about the texts. Defense counsel objected; however, the objection was overruled. RP (1/11/12 p.m.) 64-68.

At the close of all the evidence, the court directed counsel to appear in chambers:

> Now, we'll be at recess. I'd like to see you two gentlemen and have a formal discussion regarding jury instructions, what format we intend to use, so I'll see you gentleman in my chambers, and we'll go from there. Thank you.
> RP (1/11/12 p.m.) 70

Following this instructions conference, the judge went back on the record, noted that a final set of instructions had not been assembled, excused the jury, and directed counsel to appear "about a quarter after 8:00 so we can take care of business" before the jury returned at 9:00. RP (1/11/12 p.m.)

71-72. No record was made of the 8:15 session, which apparently also took place in chambers; instead, both attorneys were given an opportunity to take exception to any of the court's instructions just before they were read to the jury. RP (1/12/12) 61.

The court's instructions did not tell the jurors that conviction of harassment required proof that Mr. Hart made a "true threat," and did not include the definition of a "true threat." Instructions Nos. 13-14, Supp. CP. The instructions also failed to provide the legal definition of a firearm, and did not explain what proof was required to find that Mr. Hart was "armed" with a firearm (for purpose of the enhancement). Court's Instructions, Supp. CP. Despite this, defense counsel made no objection to the court's instructions. RP (1/12/12) 61.

Mr. Hart was convicted of both charges, and the jury answered "yes" to a special verdict, finding that Mr. Hart was armed with a firearm at the time of the assault. CP 3; Verdicts, Special Verdict, Supp. CP. At sentencing, defense counsel addressed the court as follows:

> This was a very difficult case to defend because I believed, from really my first meeting with my client and going over the reports, that it was likely that there was a mental health diagnosis that could have been made and an evaluation that would have been of interest to me, but things didn't go in that direction because at the same time there was never really any question in my mind as to Mr. Hart's competency to assist in his defense. So that's just not the way the defense strategy went in this case.

> I do still have concerns about that, but I've spoken with my client and with his mother, and I'm not aware of any actual diagnosis that has been made. Again, it would be interesting. I'm just giving this information to Your Honor as mitigation.
> RP (1/30/12) 74.

The parties agreed that Mr. Hart had no prior felonies, and he was sentenced to a total of 40 months in prison. CP 3-11. He timely appealed. CP 14.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. HART'S RIGHT AND THE PUBLIC'S RIGHT TO AN OPEN TRIAL.

A. Standard of Review

Alleged constitutional violations are reviewed de novo. Bellevue School Dist. v. E.S., 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Whether a trial court procedure violates the right to a public trial is a question of law reviewed de novo. State v. Njonge, 161 Wash.App. 568, 573, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. Id, at 576.

B. The trial court violated both Mr. Hart's and the public's right to an open and public trial by consulting with counsel in chambers to select the instructions that would guide the jury's deliberations.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const.

Article I, Sections 10 and 22; State v. Bone-Club, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); Presley v. Georgia, 558 U.S. 209, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (per curiam). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. Bone-Club, at 258-259. Failure to conduct the proper analysis requires reversal, even if the accused person did not make a contemporaneous objection. Bone-Club, at 261-262, 257.[3] In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. Presley, 130 S.Ct., at 724-725.

The public trial right ensures that a defendant "is fairly dealt with and not unjustly condemned." State v. Momah, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, "the presence of interested spectators may keep [the accused person's] triers keenly alive to a sense of the responsibility and to the importance of their functions." Id. The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. Strode, at 226; State v. Duckett, 141 Wash.App. 797, 803, 173 P.3d 948 (2007). The

[3] See also State v. Strode, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); State v. Brightman, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly de minimis, for hearings that address only legal matters, or for proceedings are merely "ministerial." See, e.g., Strode, at 230.[4,5]

In this case, the trial judge met with counsel twice in camera, to prepare and review jury instructions. RP (1/11/12 p.m.) 70-72; RP (1/12/12) 61. Although defense counsel was permitted to put exceptions on the record, no indication was made of the arguments counsel presented in chambers. RP (1/12/12) 61. The court did not analyze the Bone-Club factors in relation to either in camera proceeding. RP (1/11/12 p.m.) 70-72; RP (1/12/12) 61.

These closed door proceedings, conducted outside the public's eye without the required analysis and findings, violated Mr. Hart's constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; Bone-Club, supra. It also violated the public's right to an open trial. Id.

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[4] "This court, however, 'has never found a public trial right violation to be [trivial or] de minimis'" (quoting State v. Easterling, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

[5] The Court of Appeals has held that the public trial right only extends to evidentiary hearings. See, e.g., State v. Sublett, 156 Wash.App. 160, 181, 231 P.3d 231, review granted, 170 Wash.2d 1016, 245 P.3d 775 (2010). This view of the public trial right is incorrect, and should be reconsidered. Momah, at 148; Strode, at 230.

Accordingly, the convictions must be reversed and the case remanded for a new trial. Id.

II. THE TRIAL COURT INFRINGED MR. HART'S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Standard of Review

Ordinarily, a trial court's ruling on the scope of cross-examination is reviewed for an abuse of discretion. State v. Berlin, 167 Wash. App. 113, 127, 271 P.3d 400, review denied, 174 Wash. 2d 1009, 281 P.3d 686 (2012). This discretion, however, is subject to the requirements of the constitution. A court necessarily abuses its discretion by denying an accused person her or his constitutional rights. See, e.g., State v. Iniguez, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009); see also United States v. Lankford, 955 F.2d 1545, 1548 (11th Cir. 1992). Where the appellant makes a constitutional argument, review is de novo. Id.

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. State v. Watt, 160 Wash.2d 626, 635, 160 P.3d 640 (2007). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. City of Bellevue v. Lorang, 140 Wash.2d 19, 32, 992 P.2d 496 (2000).

The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Burke, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

B. The trial court erroneously allowed the prosecutor to cross-examine Mr. Hart on topics beyond the scope of direct examination, about which he had not waived his right to remain silent.

The Fifth Amendment to the U.S. Constitution provides that "No person shall... be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth Amendment. U.S. Const. Amend. XIV; Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Article I, Section 9 of the Washington State Constitution, provides that "No person shall be compelled in any case to give evidence against himself..." Wash. Const. Article I, Section 9.

When an accused person takes the stand and testifies, s/he waives the privilege against self-incrimination; however, the waiver does not cover all topics. Instead, "waiver of [the] Fifth Amendment privilege against self-incrimination extend[s] only to examination on matters raised in direct or redirect examination." State v. Epefanio, 156 Wash. App. 378,

389, 234 P.3d 253 reconsideration denied, review denied, 170 Wash. 2d 1011, 245 P.3d 773 (2010).

In this case, Mr. Hart's testimony was limited to facts relating to the assault charge. RP (1/11/12 p.m.) 62-64. He did not testify about his relationship with Ms. Hargrove, or about the texts he allegedly sent her. RP (1/11/12 p.m.) 62-64. In spite of this, the trial court overruled defense counsel's objection, and allowed the prosecutor to cross examine Mr. Hart about these topics. RP (1/11/12 p.m.) 64-68.

Mr. Hart's limited testimony did not waive his right to remain silent as to these topics. Accordingly, the trial court should not have allowed the prosecutor to cross examine about them. Epifanio, at 389. The court's decision overruling defense counsel's objection violated Mr. Hart's rights under the state and federal constitutions. Epifanio, at 389. The error is presumed prejudicial; thus his convictions must be reversed and the case remanded for a new trial. Watt, at 635.

III. MR. HART'S ASSAULT CONVICTION AND FIREARM ENHANCEMENT VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF EACH CHARGE/ENHANCEMENT.

A. Standard of Review

Alleged constitutional violations are reviewed de novo. E.S., at 702. The sufficiency of the evidence may always be raised for the first

time on appeal. State v. Kirwin, 166 Wash.App. 659, 670 n. 3, 271 P.3d 310 (2012) (Kirwin II).

B. Due process requires the prosecution to prove each element of an offense or enhancement beyond a reasonable doubt.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The same is true for sentencing enhancements. State v. Recuenco, 163 Wash.2d 428, 180 P.3d 1276 (2008). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

C. The evidence was insufficient to prove the elements of second-degree assault because the prosecution failed to establish that the assault was committed with an operable firearm.[6]

In order to obtain a conviction for second-degree assault, the prosecution was required to prove that Mr. Hart assaulted an officer with a deadly weapon. RCW 9A.36.021; Instruction Nos. 8-9, Supp. CP. The phrase "deadly weapon" means "any... loaded or unloaded firearm..." RCW 9A.04.110(6); see also Instruction No. 10, Supp. CP. A firearm is

[6] Included for preservation of error.

"a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(7).

In the context of deadly weapon or firearm enhancements, the Supreme Court has interpreted the word "firearm" to include only operable firearms. Recuenco, at 437 (citing State v. Pam, 98 Wash.2d 748, 754–55, 659 P.2d 454 (1983), overruled in part on other grounds by State v. Brown, 113 Wash. 2d 520, 782 P.2d 1013 (1989) opinion corrected, 787 P.2d 906 (1990) (Brown I)). The Supreme Court has not limited this definition of the word "firearm" to sentencing enhancements.[7] See, e.g., Recuenco. It should be applied to Mr. Hart's case. Recuenco.

Here, the only evidence addressing operability was an officer's testimony that the gun "looks to be in very working order [sic]," and that it did not "look to be damaged or anything." RP (1/11/12 p.m.) 43. No shots were fired, and the gun was never test-fired. RP (1/11/12 p.m.) 43. This testimony does not constitute proof beyond a reasonable doubt, even when taken in a light most favorable to the prosecution. Accordingly, the evidence was insufficient to prove that Mr. Hart assaulted another with a

[7] By contrast, the Court of Appeals has decided that the word "firearm" can be interpreted to include non-functional firearms that can be repaired, but only in the context of substantive crimes, not in the context of firearm enhancements. See, e.g., State v. Raleigh, 157 Wash. App. 728, 734, 238 P.3d 1211 (2010) review denied, 170 Wash. 2d 1029, 249 P.3d 624 (2011) (interpreting RCW 9.41.040). It is not clear why a firearm must be operable in order for an enhancement to apply, but need not be operable when its possession or use is an element of an offense.

deadly weapon. The conviction must be reversed and the charge dismissed. Smalis, at 144.

D. The prosecution failed to prove that Mr. Hart was armed with an operable firearm, as required for imposition of the firearm enhancement.

A firearm enhancement may only be imposed if the prosecution proves beyond a reasonable doubt that the offender was armed with an operable firearm. Recuenco, at 437; State v. Pierce, 155 Wash. App. 701, 714-15, 230 P.3d 237 (2010). As noted above, the prosecution provided only testimony that the gun looked functional, without proving that it actually was operable. RP (1/11/12 p.m.) 43.

The evidence was insufficient to prove the firearm enhancement. Pierce, at 714-715. Accordingly, the enhancement portion of the sentence must be vacated and the case remanded for correction of the Judgment and Sentence. Id.

IV. THE FIREARM ENHANCEMENT WAS IMPOSED IN VIOLATION OF MR. HART'S RIGHT TO DUE PROCESS AND HIS RIGHT TO A JURY DETERMINATION OF ANY FACT USED TO INCREASE THE PENALTY BEYOND THE STANDARD RANGE.

A. Standard of Review

Alleged constitutional violations are reviewed de novo. E.S., at 702.

A manifest error affecting a constitutional right may be raised for the first time on review.[8] RAP 2.5(a)(3); State v. Kirwin, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009) (Kirwin I). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).[9] An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. State v. Nguyen, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Jury instructions are reviewed de novo. State v. Bashaw, 169 Wash.2d 133, 140, 234 P.3d 195 (2010), overruled on other grounds by State v. Nunez, 174 Wash. 2d 707, ___ P.3d ___ (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kyllo, 166 Wash.2d 856, 864, 215 P.3d 177 (2009).

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[8] In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see State v. Russell, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. Id.

[9] The policy is designed to prevent appellate courts from wasting "judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits." State v. WWJ Corp., 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

B. The court's instructions relieved the prosecution of its burden of proving that Mr. Hart was armed with a firearm.

Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. U.S. Const. Amend. VI and XIV; Wash. Const. Article I, Sections 21 and 22.; Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Imposition of an enhanced sentence without a proper jury finding on the underlying facts violates an accused person's right to due process and to a jury trial. Id; Recuenco, supra.

1. The court's instructions and special verdict forms relieved the prosecution of its burden to prove that Mr. Hart was "armed" with a firearm.

Before imposing a sentencing enhancement, the trial court must instruct the jury on the state's burden to prove the "elements" required in order for the jury to return a "yes" verdict relating to the enhancement. See, e.g., Recuenco, supra. Firearm enhancements may be imposed only if a person is "armed" with a firearm. See RCW 9.94A.533; RCW 9.94A.825. A person is "armed" if the weapon is easily available, readily accessible, and has some nexus with the person and the crime. State v. Brown, 162 Wash.2d 422, 431, 173 P.3d 245 (2007) (Brown II). Proof of

mere possession is insufficient, by itself, to establish that a person is "armed" within the meaning of the statutes, and cannot support imposition of firearm or deadly weapon enhancements. State v. Gurske, 155 Wash.2d 134, 138, 118 P.3d 333 (2005).

Before a firearm enhancement can be imposed, the jury must be instructed on the definition of the word "armed" and on the meaning of the word "firearm." See, e.g., In re Pers. Restraint of Delgado, 149 Wash. App. 223, 237, 204 P.3d 936 (2009) (noting that "the jury was not instructed on the definition of 'firearm' for sentencing enhancement purpose.")

Here, the trial court did not define the word "armed" and did not provide a definition of the word "firearm." This relieved the prosecution of its burden to prove the enhancement, and violated Mr. Hart's Fourteenth Amendment right to due process. Blakely, supra; Recuenco, supra. Accordingly, the firearm enhancement must be vacated and the case remanded to the trial court for correction of the judgment and sentence. Id.

2. The jury's verdict does not support imposition of a firearm enhancement because it does not reflect a jury finding that Mr. Hart was "armed" with a firearm.

The firearm special verdict cannot support imposition of a firearm enhancement for another reason as well. Because the jury was not

properly instructed, the special verdict form does not reflect a jury finding that Mr. Hart was armed with an operable firearm. Imposition of an enhancement without a jury determination of the underlying facts violates Blakely and Recuenco.

Since the special verdict does not reflect a proper finding that Mr. Hart was armed with an operable firearm, the sentencing court was without authority to impose the enhancement. Blakely, supra; Recuenco, supra. This error is not subject to harmless error review. State v. Williams-Walker, 167 Wash. 2d 889, 901, 225 P.3d 913 (2010).

Accordingly, the enhancement must be vacated, and the case remanded for correction of the Judgment and Sentence. Id.

V. MR. HART'S CONVICTION FOR HARASSMENT VIOLATED HIS FIRST AMENDMENT RIGHT TO FREE SPEECH AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review

Constitutional violations are reviewed de novo. E.S., at 702.

Jury instructions are reviewed de novo. Bashaw, at 140.

Instructions must make the relevant legal standard manifestly apparent to the average juror. Kyllo, at 864.

B. The court's instructions relieved the prosecution of its burden to prove that Mr. Hart made a "true threat."

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; State v. Aumick, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995). A person is guilty of harassment when s/he knowingly threatens to cause bodily injury to another, and by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1).

There is an additional, non-statutory element: to avoid violating the First Amendment, the state must prove the threat constitutes a "true threat" rather than idle chat. U.S. Const. Amend. I; State v. Schaler, 169 Wash.2d 274, 236 P.3d 858 (2010). A "true threat" is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict damage. State v. Johnston, 156 Wash.2d 355, 360-361, 127 P.3d 707 (2006).

The trial court failed to instruct the jury on this non-statutory element. The words "true threat" did not appear in the "to convict" instruction. Instruction No. 14, Supp. CP. Nor did the constitutionally required definition of a "true threat" appear elsewhere in the instructions. Court's Instructions to the Jury, Supp. CP. Because the court's

instructions did not make the relevant standard manifestly clear to the average juror, the prosecution was relieved of its burden to prove a true threat. Accordingly, Mr. Hart's conviction for harassment violated his Fourteenth Amendment right to due process and his First Amendment right to free speech. Aumick, supra; Johnston, supra.

C. The error was prejudicial and requires reversal.

The omission of an essential element requires reversal. Aumick, supra. The error here is presumed prejudicial. Watt, at 635. Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error.

First, the evidence was not overwhelming. Mr. Hart's text messages were ambiguous and subject to interpretation. A reasonable person in his position would not necessarily foresee that his conduct would be interpreted as a serious expression of an intention to inflict damage. Johnston, at 360-361. Second, the error was not trivial, formal, or merely academic; it prejudiced Mr. Hart and likely affected the final outcome of the case. Lorang, at 32. A reasonable jury could have concluded that Mr. Hart's conduct did not constitute a "true threat."

Because the error was not harmless, Mr. Hart's conviction for harassment must be reversed. Id. The case must be remanded to the trial court for a new trial. Id.

VI. MR. HART'S CONVICTION FOR HARASSMENT VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 22.

A. Standard of Review

Constitutional questions are reviewed de novo. E.S., at 702. A challenge to the constitutional sufficiency of a charging document may be raised at any time. State v. Kjorsvik, 117 Wash.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. Id, at 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. Id, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required. State v. Courneya, 132 Wash.App. 347, 351 n. 2, 131 P.3d 343 (2006); State v. McCarty, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

B. The Information was deficient because it failed to allege that Mr. Hart communicated a "true threat."

The Sixth Amendment to the Federal Constitution guarantees an accused person the right "to be informed of the nature and cause of the accusation." U.S. Const. Amend. VI.[10] A similar right is secured by the Washington State Constitution. Wash. Const. Article I, Section 22. All

[10] This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; Cole v. Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

essential elements—both statutory and nonstatutory—must be included in the charging document. State v. Johnson, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992). An essential element is "one whose specification is necessary to establish the very illegality of the behavior." Id (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)).

As noted above, the state must prove a "true threat" in order to obtain a conviction for harassment.[11] Schaler, supra. A "true threat" is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict damage. State v. Johnston, 156 Wash.2d 355, 360-361, 127 P.3d 707 (2006).

Here, the state alleged that Mr. Hart knowingly threatened to cause bodily injury and placed another in reasonable fear that the threat would be carried out, but did not allege that his threat qualified as a "true threat." CP 1-2. Nor can this element be implied from the charging language. CP 1-2. Accordingly, the allegation in the Information was not (by itself)

[11] Division I has decided that the requirement of a "true threat" is not an element, and need not be alleged in a charging document. State v. Tellez, 141 Wash.App. 479, 483-484, 170 P.3d 75 (2007); State v. Atkins, 156 Wash.App. 799, 805, 236 P.3d 897 (2010). This is incorrect: a threat that is not a "true threat" is not illegal. Thus the existence of a "true threat" is essential "to establish the very illegality of the behavior." Johnson, at 147. The Supreme Court has explicitly reserved ruling on the question. See Schaler, at 289 n. 6.

sufficient to charge a crime, and prejudice is presumed. Kjorsvik, supra. Because the Information was deficient, Mr. Hart's conviction for harassment must be reversed and the charge dismissed without prejudice. Kjorsvik, supra.

VII. MR. HART WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. State v. A.N.J., 168 Wash. 2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const.

Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." United States v. Salemo, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must satisfy "the familiar two-part Strickland... test for ineffective assistance claims—first, objectively unreasonable performance, and second, prejudice to the defendant." State v. Sandoval, 171 Wash. 2d 163, 169, 249 P.3d 1015 (2011) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also State v. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. Reichenbach, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy.[12]

These are guidelines only, not "mechanical rules." Strickland, at 696. Instead, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. In every

[12] See, e.g., State v. Hendrickson, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.").

case, the court must consider whether the result is unreliable because of a breakdown in the adversarial process. Id.

C. Defense counsel was ineffective for failing to adequately investigate Mr. Hart's case.

To be effective, counsel must conduct an adequate investigation. A.N.J., at 110-112. Any decision not to investigate must be directly assessed for reasonableness.[13] Duncan v. Ornoski, 528 F.3d 1222, 1234 (9th Cir. 2008). A failure to investigate is especially egregious when counsel fails to consider potentially exculpatory evidence. Id, at 1234-35.

The duty to investigate requires counsel to consult with experts, where appropriate. A.N.J., at 112. In addition, counsel should confer with the accused person without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973); see also RPC 1.4.

In this case, counsel had serious questions about his client's mental health, but failed to consult with an expert or investigate a possible diminished capacity defense. See RP (1/30/12) 74. Nor did counsel investigate his client's mental health issues for mitigation purposes at

[13] Furthermore, strategic choices made after less than complete investigation are only reasonable to the extent that professional judgment supports the limitations on investigation. Foust v. Houk, 655 F.3d 524, 538 (6th Cir. 2011).

sentencing, despite a clear indication that such investigation was warranted. RP (1/30/12) 74.

Defense counsel should have consulted with experts and investigated the possibility of diminished capacity, either as a defense at trial or as a mitigating factor at sentencing. By failing to do these basic things, fundamental to representation of an accused person, counsel engaged in conduct that fell below an objective standard of reasonableness. Sandoval, at 169; Reichenbach, at 130.

D. Defense counsel unreasonably failed to object and seek a limiting instruction when the prosecutor introduced a prior inconsistent statement as substantive evidence.

To be minimally competent, an attorney must research the relevant law. Kyllo, at 862. Familiarity with the law allows counsel to interpose appropriate objections and to seek appropriate instructions at trial. A failure to propose proper instructions constitutes ineffective assistance of counsel. State v. Woods, 138 Wash. App. 191, 156 P.3d 309 (2007); see also State v. Rodriguez, 121 Wash. App. 180, 87 P.3d 1201 (2004).

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have

been different had the evidence been excluded. State v. Saunders, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

Here, defense counsel failed to object to hearsay introduced through Officer Blodgett. Blodgett was permitted to testify that he'd interviewed Hargrove, and that she'd expressed worry about her own safety, and felt threatened by Mr. Hart's text messages. RP (1/11/12 a.m.) 47-49. Hargrove's out-of-court statement was hearsay, and should have been the subject of an objection. See ER 801, ER 802. Counsel also failed to raise a similar objection when the prosecutor later cross-examined Hargrove regarding her out-of-court statement. RP (1/11/12 p.m.) 52-54.

The failure to object constituted ineffective assistance. Saunders, at 578. First, there was no strategic reason to allow the prosecution to introduce this evidence. It bolstered the prosecution's case, providing the only testimony that supported the "reasonable fear" element of the harassment charge. See Instructions Nos. 13-14, Supp. CP.

Second, an objection would likely have been sustained, as the testimony consisted of inadmissible hearsay that did not fit within an exception to the rule against hearsay. Even if the evidence had been admissible for a limited purpose—such as to impeach Hargrove's testimony—counsel should have objected and asked the court to limit the

jury's consideration of the testimony. Absent a limiting instruction, the evidence was available for any purpose, including use as substantive evidence of guilt. State v. Myers, 133 Wash.2d 26, 36, 941 P.2d 1102 (1997).

Third, jury's verdict on the harassment charge would likely have been different, had counsel objected.[14] The jury had no evidence establishing that Mr. Hart's words or conduct placed Ms. Hargrove in reasonable fear, as required to establish harassment. Absent the testimony, the charge would have been dismissed with prejudice. Indeed, defense counsel sought dismissal on sufficiency grounds, albeit belatedly. RP (1/11/12 p.m.) 55. The motion was denied, because of counsel's failure to object to the hearsay testimony and seek an instruction limiting its use at trial. RP (1/11/12 p.m.) 56-57.

Counsel should have objected and sought a limiting instruction when the prosecution first introduced the testimony through Blodgett. RP (1/11/12 a.m.) 47-49. Counsel should also have objected and sought a limiting instruction when the prosecutor cross-examined Ms. Hargrove about her statement. RP (1/11/12 p.m.) 52-54. Counsel's failure to object

[14] Had counsel performed reasonably, it is unlikely the case would have even reached the jury.

and seek a proper instruction fellow below an objective standard of reasonableness. Reichenbach, at 130.

E. Defense counsel's errors prejudiced Mr. Hart.

The cumulative effect of these errors was to undermine "the fundamental fairness of the proceeding." Strickland, at 696. Defense counsel failed to investigate the facts, confer with his client, consult with experts, or object to inadmissible testimony.

The result of these errors was a breakdown in the adversarial process. Id. The basic mistakes revealed in the record establish that counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Accordingly, "the adversary process itself [is] presumptively unreliable" here. Id. Mr. Hart's convictions must be reversed and the case must be remanded for a new trial. Id.

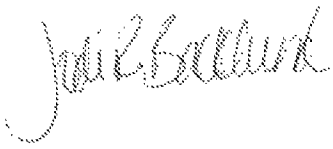
CONCLUSION

For the foregoing reasons, Mr. Hart's convictions must be reversed and the case dismissed with prejudice. In the alternative, the harassment charge must be dismissed without prejudice, and the assault charge remanded for a new trial. Upon retrial, the state may not seek a firearm enhancement.

If the assault charge is not reversed, the firearm enhancement must be vacated and the case remanded for correction of the judgment and sentence.

Respectfully submitted on September 4, 2012,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Bryan Hart, DOC #789790
Cedar Creek Correctional Center
P.O. Box 37
Little Rock, WA 98556-0037

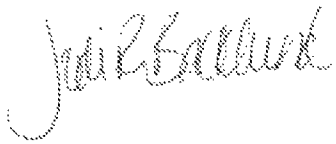
And to:

Grays Harbor County Prosecuting Attorney
102 W Broadway Ave Rm 102
Montesano, WA, 98563-3621

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 4, 2012.



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September 04, 2012 - 3:35 PM

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